

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PARVEZ YAZDANI, et al,)	15-CV-1427
)	
Plaintiffs,)	Portion of Hearing
)	Transcribed
vs.)	
)	
BMW OF NORTH AMERICA, LLC,)	
et al,)	Philadelphia, PA
)	June 15, 2016
Defendants.)	2:44 p.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE TIMOTHY R. RICE AND JURY
UNITED STATES MAGISTRATE JUDGE

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I N D E X

<u>WITNESS:</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>THE COURT</u>
Kevin Breen	3	50	57
<u>CHARGE OF THE COURT:</u>			<u>PAGE</u>
By Judge Rice			69

1 (The following was heard in open court at 2:44 p.m.)

2 THE COURT: All right. Welcome back, folks. Have a
3 seat. Let's see, are we moving to cross-examination or are
4 you still --

5 MR. HEINOLD: Yes, Your Honor. I have no further
6 questions.

7 THE COURT: Okay. Excellent. Mr. Mack has no
8 questions I assume?

9 MR. MACK: Just a few, Judge.

10 THE COURT: I thought I'd try.

11 We have a new court reporter, Dennis Taylor. One of
12 our stars of the courthouse and a big Phillies fan for those
13 of you who like baseball. Yesterday not only was it hot in
14 the courtroom it was hot in Toronto. The Phillies got smoked
15 as we know. Welcome to the big leagues, right.

16 All right. Mr. Mack, what have you got for us?

17 MR. MACK: All right.

18 CROSS EXAMINATION

19 BY MR. MACK:

20 Q Good afternoon, Mr. Breen. How are you?

21 A Good. Thank you.

22 Q All right. You -- you testify professionally for a
23 living, right?

24 A I testify in court half a dozen times a year.

25 Q All right. And the other time you spend your work in the

1 forensic consulting business, right?

2 A Some of it, yes.

3 Q All right. Well, most of it, right?

4 A Well, about two-thirds of it.

5 Q All right. And you own a business that does forensic
6 consulting work?

7 A I'm one of about 100 people that own the business.

8 Q Right.

9 A Yes.

10 Q Okay. And you've been doing forensic consulting work
11 since the 1970's, is that right?

12 A Somewhere thereabouts.

13 Q Okay. So the last 38, 40 years?

14 A Yes.

15 Q All right. And how many times have you testified as a
16 professional witness in court?

17 A I really don't know. I'm sure it's more than 50 times
18 though.

19 Q Okay. How much of your work is performed for plaintiffs?

20 A Typically 10 to 20 percent.

21 Q 10 to 20 percent?

22 A Something like that.

23 Q When was the last time you testified in court on behalf
24 of a plaintiff in a warnings case?

25 A About a year ago.

1 Q What case was that?

2 A It was a boating accident.

3 Q Was that in Florida?

4 A Yes.

5 Q What were your opinions -- what were your opinions in
6 that case?

7 A That the accident was caused by the combination of the
8 design of the boat and the information the driver knew about.

9 Q Okay. And you testified on behalf of the plaintiff that
10 the accident was caused -- the plaintiff -- were people
11 injured by the boating accident?

12 A Yes.

13 Q And they were suing the driver of the boat?

14 A The manufacturer.

15 Q They were suing the manufacturer? Okay. Any other times
16 in the last five years?

17 A I mean, offhand I don't recall. There was one last year
18 that involved an off-road motorcycle -- motorcycle type
19 vehicle at a camp ground where I testified that the warnings
20 and the operation allowed in the camp ground was the cause of
21 the accident.

22 Q What were the warnings at issue there?

23 A Well, there weren't any. That was my concern.

24 Q Okay. And so that's a big problem for you, right? I
25 mean, if there are no warnings about a specific hazard?

1 A Well, there was no -- no warnings and no instruction in
2 terms of how to use a certain area of the camp ground,
3 roadways, and there was a head-on collision.

4 Q When did you first get this bike?

5 A That particular one? Maybe two or three weeks ago,
6 something like that.

7 Q Two or three weeks ago? And did you drive it?

8 A I have not driven that particular bike. No.

9 Q Have you ever driven a bike like this, an 1150R?

10 A Yes.

11 Q All right. Do you know how to start it up?

12 A I mean, generally, yes.

13 Q Could you come down and show the jury how you start it
14 up?

15 A Well, there's no fuel in here, but you turn the key on
16 holding the clutch, hit the starter button.

17 Q Okay. Then what do you do?

18 A Drop it in gear to go.

19 Q Okay. You have to drop it in gear. So after -- after --
20 well, not while it's idling, right? You don't drop it in gear
21 while it's idling?

22 A Sure.

23 Q You do? Okay.

24 A Well, I've got my hand on the clutch and it's in idle.
25 You drop it in gear and you go.

1 Q If you've made the mistake of not letting it warm enough
2 before you get up and go and the engine stalls, say you're
3 pulling out onto a street, can you get hit by a car?

4 A If it stalls that potential exists.

5 Q All right. So you have to make sure as a rider to make
6 sure it's warmed up before you try to merge into traffic or
7 get up and go, right?

8 A Sure. Typically, you know, any vehicle you start up and
9 let it run for a few seconds to make sure everything's okay.

10 Q All right. You can go back. You understand that Mr.
11 Yazdani testified in this case that what he did in February of
12 2013 was start it up and drop it into the run position. You
13 understand that, right?

14 A In the wrong position?

15 Q In other words turn the choke off.

16 THE COURT: Did you say wrong or run?

17 MR. MACK: Run. Run position.

18 THE COURT: R-U --

19 THE WITNESS: Oh, I'm sorry, I thought you said
20 wrong.

21 MR. MACK: Run.

22 THE COURT: R-U-N.

23 MR. MACK: The C position. Sorry. The no choke.

24 THE WITNESS: I understand that he testified he
25 started it up first on the -- in that mode and then dropped it

1 in the run mode.

2 BY MR. MACK:

3 Q Which you have to, right? I mean, he followed the
4 operating procedure, right?

5 A It appears he did, yes.

6 Q Okay. Now, what -- where in the manual does it tell Mr.
7 Yazdani not to do what he did?

8 THE COURT: Do you have the manual there, sir?

9 THE WITNESS: Yes, I do.

10 THE COURT: I think the operative pages are 51 and
11 60, is that right?

12 THE WITNESS: Yes.

13 MR. MACK: Well, we'll see.

14 THE COURT: Well, at least those are the pages --

15 MR. HEINOLD: Your Honor --

16 THE COURT: -- so he doesn't have to read the whole
17 manual.

18 MR. HEINOLD: -- if I could ask? When he says what
19 he did does he mean the way he operated the choke or does he
20 mean the way he -- he --

21 THE COURT: What he testified to, right?

22 MR. HEINOLD: Well, his question is vague. I don't
23 know what --

24 THE COURT: All right.

25 MR. HEINOLD: -- it means.

1 THE COURT: Well, what Mr. Yazdani testified he did.
2 BY MR. MACK:
3 Q You understand the question?
4 A Well, I think so.
5 Q What -- what about what Mr. Yazdani testified that he did
6 violated the instructions of the manual?
7 A Well, the first one is on page 51 under --
8 Q That's -- what section is that?
9 A Important notes.
10 Q And what subsection is that?
11 A Essentially starting off.
12 Q Well, the subsection on the top of the page says what?
13 A Important notes.
14 Q And then it says catalytic converter, right?
15 A It says risk of fire under the column this one's in.
16 MR. MACK: Well, let's pull it up.
17 UNIDENTIFIED SPEAKER: 51?
18 MR. MACK: It's P-1.
19 (Pause)
20 BY MR. MACK:
21 Q Do you have a copy of the manual, right?
22 A I have a copy of it, yes.
23 (Pause)
24 BY MR. MACK:
25 Q You're talking about the -- the warning?

1 MR. MACK: First of all, let's pull up this page.
2 Let's highlight this page. Okay. There's two pages here, so
3 just this page.

4 THE COURT: The page on the right.

5 THE WITNESS: Well, the page on the right is
6 actually both of those columns. You've got them both pulled
7 up.

8 UNIDENTIFIED SPEAKER: Yes.

9 MR. MACK: All right. Let's put it in the center
10 and make it as big as we can.

11 BY MR. MACK:

12 Q All right. Now, the page on the right it's --

13 MR. MACK: We don't want to see the page on the left
14 yet. All right.

15 BY MR. MACK:

16 Q Now, is that -- is that the instruction you were talking
17 about?

18 A Yes, this first one.

19 Q Okay. And so that's -- it says catalytic converter,
20 right?

21 A On the left panel. Risk of fire on the right panel.

22 Q On the left panel does it say catalytic converter at the
23 top or not?

24 A The top of the left panel, yes.

25 Q Okay. So you're saying the catalytic converter section

1 is only the left panel?

2 A No.

3 Q The whole page is about the catalytic converter, sir?

4 A No.

5 Q Oh, it's not?

6 A No.

7 Q Okay. So risk of fire it -- it says high temperatures
8 occur at the exhaust system, particularly -- particularly if a
9 what is installed?

10 A Catalytic converter is installed.

11 Q All right. But this has nothing to do with the catalytic
12 converter this risk of fire?

13 A That language right there does not. No.

14 Q So why is it talking about a catalytic converter?

15 A Because that's what's started on the left panel and
16 continues on down to the top part of the right panel.

17 Q Okay. You're telling the jury that this page has nothing
18 to do with the catalytic converter? Only the word says
19 catalytic converter on the left-hand side of the page, right?
20 Is that what you're saying?

21 A I didn't say that.

22 Q Tell me what you're saying.

23 A I said the left panel is about the catalytic converter.
24 It continues over in the first paragraph of the right panel.

25 Q Okay. And so it says risk of fire, right?

1 A Right.

2 Q And that deals with the catalytic converter, right?

3 A Right.

4 Q Okay. That doesn't deal with starting the vehicle?

5 That's not in the starting section, is it?

6 A No.

7 Q All right. That has nothing to do with what he did,
8 right?

9 A Up to that point, correct.

10 Q All right. So let's go -- let's go to the next part, the
11 starting procedure. Let's go to page 61 in the manual.

12 A Well, just so it's clear there's -- there's additional
13 information in that warning block that deal with -- do not
14 allow the engine to idle unnecessarily or for prolonged
15 periods. Risk of overheating or fire. Ride away immediately
16 after starting the engine.

17 Q That's right. Let's talk about that. We just said you
18 can't ride away immediately after starting the engine. That's
19 dangerous, right, you can stall and you can die, right?

20 A Well, I think you've got to start engine and make sure
21 everything is working and then you can ride away. It takes a
22 few seconds to check all that out.

23 Q Not immediately, right? You can't -- you can't start it
24 and drive away immediately? You've got to check everything
25 out.

1 A You've got -- it takes time to drop it in gear and all
2 that type of stuff.

3 Q Right. So not immediately? You can't do it immediately?

4 A Right. But you shouldn't hesitate and wait several
5 minutes.

6 Q Okay. So for several minutes? Where does it tell Mr.
7 Yazdani how long he can wait?

8 THE COURT: What page are we on?

9 MR. MACK: We're in the manual.

10 THE COURT: Which one?

11 MR. MACK: I don't know which one. I don't think it
12 says it.

13 THE COURT: What page are we on, Mr. Breen?

14 MR. MACK: He's looking at -- he's looking at 51.

15 THE COURT: 51?

16 THE WITNESS: It tells him prolonged periods of
17 time. It does not give him a three minute, two minute, seven
18 minute thing. Prolonged is the word that's used.

19 BY MR. MACK:

20 Q What does prolonged mean?

21 A Well, I think it's an extended period of time beyond what
22 the engine needs to get to a proper idle.

23 Q And how does the fire develop if you don't drive it away
24 immediately pursuant to that warning?

25 A Well, if you allow it to idle for a prolonged period of

1 time at some point in time things keep -- heat keeps building
2 up, heat keeps building up, heat keeps building up and you --
3 it creates the risk of a fire.

4 Q Heat keeps building up, heat keeps building up, heat
5 keeps building up. Is that your testimony?

6 A Right. As you sit idling heat will build up.

7 Q And what happens to the -- first of all, do you know the
8 operating temperature of the bike?

9 A Under what conditions? That's a pretty broad question.

10 Q Idling, sir? Idling at a standstill in a garage?

11 A I've seen some of the documents from testing a new bike
12 that, you know, test lab environment from BMW that had the
13 idle temperature for the oil at about 300 degrees Fahrenheit.

14 Q All right. And that's the only information you have
15 about the operating temperature of the vehicle, right?

16 A That I've seen in this case, yes.

17 Q All right.

18 A Well, there's other temperatures there in terms of
19 exhaust temperature and things like that, but that --

20 Q Sure, but that's the only information you have. You
21 don't have any other information.

22 A In this case, no.

23 Q Right. About the R1150R, right?

24 A Correct.

25 Q And that testing document also says it's absolutely safe

1 to idle, right?

2 A No, it doesn't say that.

3 Q Oh, it doesn't?

4 MR. MACK: Let's pull it up. Let's take a look at
5 it.

6 (Pause)

7 MR. MACK: It's pages 19 and 20 of that exhibit.
8 We're going to look at page 20 and we're going to blow up that
9 last -- that top paragraph.

10 THE COURT: This is 126?

11 MR. MACK: 126, Judge. P-126

12 THE COURT: Got you.

13 MR. MACK: Page 20, top -- top of the page.

14 (Pause)

15 BY MR. MACK:

16 Q See it says normal idle is absolutely no problem?

17 A Right. That's not the question you asked, sir.

18 Q Well, what would -- when you drop -- when you start a
19 bike in a stationary position on the center stand, all right,
20 you follow me so far? You start a bike --

21 A Okay.

22 Q -- in a stationary position, center stand --

23 A All right.

24 Q -- after the few seconds of warm-up that you said you
25 have to do before you go, right? Yes.

1 A Well, go ahead because I'm confused by the center stand
2 part of it, but go ahead.

3 Q Do you know what a center stand is?

4 A Yes.

5 Q Is it on the center stand now?

6 A Yes.

7 Q Are you confused about that?

8 A No, but --

9 Q All right.

10 A -- you don't drop the bike and go.

11 Q When it's started on -- when it's started you put it into
12 the C position?

13 A Okay.

14 Q That means no choke, right?

15 A Correct.

16 Q And it's otherwise referred to as normal idle, right?

17 A Right.

18 Q Is normal idle any problem?

19 A I would think not.

20 Q Okay. If normal -- so part of your job as a human
21 factors or ergonomics forensic consultant is to talk about the
22 efficacy or adequacy of warnings, right?

23 A Yes.

24 Q And I was sitting over here listening to you testify and
25 I heard you mention that it's not important for manufacturers

1 to -- I shouldn't say it's not important. What I believe you
2 said was you shouldn't put any information on the bike unless
3 it's -- unless it's absolutely critical, right?

4 A Well, I think it's a whole lot more than that. I walked
5 through a whole system of whether you start putting labels on
6 the bike and -- and what types of labels for what purposes as
7 opposed to putting them in other forums.

8 Q And you talked about situations where users are
9 encountering risks that they would have no idea about, right?
10 That would be something that would be a situation that had to
11 be warned about very clearly and concisely.

12 A At some level, yes.

13 Q Right. And if someone was used to using a particular
14 product for a period of time, maybe their entire life, and the
15 use of a different company's product would present --
16 introduce a new risk that would be something that you would,
17 as a manufacturer, want to warn about --

18 A Maybe.

19 Q -- that new risk, right?

20 A Maybe.

21 Q Well --

22 A It depends on what it is.

23 Q Yes.

24 A I mean, you have to, kind of, go through the process.

25 Q I mean, we're talking about severity.

1 A You have to go through the process and see what it is.

2 Q And you talk about severity and frequency, right?

3 A Sure.

4 Q And one of the things that you look at as a human factors
5 expert, like Dr. Vigilante did, was the exposure, right? How
6 often somebody's exposed to the risk? That's one of the
7 things.

8 A Sure.

9 Q And the severity of the risk is something else, right?

10 A Sure.

11 Q And fire is a severe risk, right?

12 A At some level, yes. It's --

13 Q Some?

14 A Comparative -- well, comparative. I mean, compared to
15 personal injury it's a different issue.

16 Q Can you be personally injured by a fire?

17 A It's possible.

18 Q Okay. And as a manufacturer you can't assume that the
19 fire that you're going to cause is only going to cause
20 property damage, right? You have to assume it's going to
21 cause personal injury or death, right?

22 A Correct.

23 Q All right. This particular bike you examined it, right?

24 A Yes.

25 Q You're familiar with it?

1 A In general, yes.

2 Q All right. You said you're familiar with air-cooled
3 engines from your prior experiences, your life experiences and
4 your -- and your professional experiences, right?

5 A Right. One of the motorcycles I own is air-cooled.

6 Q Is this an air-cooled engine?

7 A Yes, it is.

8 Q Do you know what an oil-cooled engine is?

9 A Yes.

10 Q Do you know what oil-coolers are?

11 A Yes.

12 Q All right. Are these oil-coolers?

13 A We have oil-coolers in this engine as well as air-cooled.
14 Yes.

15 Q Oh, so it's not just air-cooled. It's also oil-cooled,
16 right?

17 A Right, there's an oil-cooler in there as well, but it
18 cools the oil, not the engine.

19 Q And that means when it's -- when you're -- when you're
20 idling there is a cooling system. The oil is still pumping
21 through the oil-coolers, right?

22 A Right.

23 Q So it's dissipating heat while you're sitting in -- while
24 you're sitting on the bike or while it's idling, right?

25 A At some level, sure.

1 Q Right. Okay. Where -- where do you get the information
2 that at idle, a normal idle, the engine will continue to heat
3 and heat and heat and heat and heat?

4 A Well, if it continues to run, if the engine isn't cooled
5 by the air flow, it's going to continue to get hotter.

6 Q Now, the testing that was performed by BMW established
7 that -- that after 25 minutes the temperature remains constant
8 through 50 minutes, right?

9 A For that particular motorcycle, yes.

10 Q Which is this particular motorcycle?

11 A Well, no, this is a brand new version of this motorcycle.
12 This is 12 years old.

13 Q And so --

14 MR. HEINOLD: I didn't hear that last question.

15 THE COURT: It's 12 years old.

16 MR. MACK: This is 12 years old.

17 BY MR. MACK:

18 Q Well, tell me what the difference is. Do you think that
19 there would be a ride away temperature on a bike that was 12
20 years old?

21 A Well, there's a lot of things that affect, you know, how
22 hot an engine gets. I mean, how well it's tuned. Whether the
23 two cylinders are synchronized. Is the oil at the proper
24 level? Is it -- is it even, you know, relatively new oil? Is
25 it old oil? Is the engine running the way it's supposed to?

1 There's a lot of things that will affect it.

2 Q Normal wear and tear will cause changes in temperature,
3 right?

4 A At some level, sure.

5 Q And you're not aware in this particular case of any
6 particular damage to the bike, Mr. Yazdani's bike, or any
7 special service to his bike that would have caused his engine
8 to run particularly hotter than -- than it did in the lab, are
9 you?

10 A Not necessarily, but at the time of the incident it was
11 nine years old, it hadn't had the oil changed in two years, so
12 I don't know.

13 Q How often had it been driven in those two years?

14 A He indicates not a lot. It looks like about 4, 5,000
15 miles.

16 Q What does the manual say about changing the oil?

17 A Every year or I think it's 8,000 miles.

18 Q Tell me this, what does the manual say about winterizing
19 the bike?

20 A There's not a lot of detail provided about winterizing.

21 Q Well, tell me what detail there is.

22 A There's not a winterizing schedule on the bike.

23 Q There's no information about how to winterize the bike,
24 right?

25 A That's correct.

1 Q Is there any information at all in the manual about how
2 to maintain the bike through a winter if you live in a colder
3 climate?

4 A No.

5 Q Mr. Yazdani's method of running the engine every so
6 often, 30 to 40 times because he did it over two winters,
7 didn't violate any of the provisions in the manual?

8 A In and of itself, no.

9 Q There's nothing in the manual that says he can't do what
10 he did?

11 A Just go out and run it for a short period of time? No.

12 Q Well -- and there's nothing that defines -- defines what
13 a short period of time is, right?

14 A Well, it talks about prolonged. 30 to 40 minutes is not
15 a short period of time. I don't care how you look at it.

16 Q You don't care? What do you base that on? 30 to 40
17 minutes is not -- tell me about that. Do you base it on the
18 test where it showed 50 minutes is absolutely no problem at
19 normal idle? Is that what you base it on?

20 A No.

21 Q So you just ignored the test and this is your own
22 opinion?

23 A It's my opinion to let a motorcycle run unattended for 30
24 to 40 minutes is a prolonged period of time.

25 Q What is unattended mean?

1 A Well, I think attended means being somewhere where you
2 can do something if something happens with the motorcycle.
3 You can shut it off.

4 Q Shut if off? Do you know if Mr. Yazdani's bike was still
5 running when -- when he came outside and it was on fire?

6 A I believe he -- I believe he said it was, but I kind of
7 find that hard to believe.

8 Q All right. Well, would it surprise you if his testimony
9 was it was not still running? Would that surprise you?

10 A That would not surprise me. I would not expect it to be
11 running.

12 Q That would be consistent with your expectations, right,
13 that it would not --

14 A Would not be running, correct.

15 Q Okay. Now, what about the bike would cause it to catch
16 fire while idling in place in Mr. Yazdani's garage in February
17 of 2013?

18 A I've not investigated the fire. I never saw the remains
19 of it, so I don't know what all the possibilities are. I
20 understand that you all have suggested it's an oil leak that
21 led to a fire and that could be. I just don't know.

22 Q An oil leak? How does -- how does that happen? I mean,
23 what's the allegation?

24 A It's my understanding that you all believe that the sight
25 glass deformed, allowed oil to leak out.

1 Q The sight glass? I'm sorry.

2 A The sight glass deformed and allowed oil to leak out.

3 Q Allows oil to leak out? Do you know the mechanism by
4 which the sight glass fails?

5 A I don't.

6 Q Do you know what the sight glass is made of?

7 A I've seen a reference to some material called grimald or
8 something like that.

9 THE COURT: I think he is telling you that he
10 doesn't know these answers.

11 MR. MACK: I know he is --

12 THE COURT: I know.

13 MR. HEINOLD: -- Judge.

14 THE COURT: So he -- this is not his area of
15 expertise.

16 MR. MACK: Well, I -- I would agree, Judge.

17 THE COURT: He's not a --

18 MR. MACK: Absolutely.

19 THE COURT: -- fire causation expert.

20 MR. MACK: No, he's a design -- he's supposed to be
21 a motorcycle design expert.

22 THE COURT: Okay.

23 MR. MACK: So I'm asking him about --

24 THE COURT: You can ask him about that.

25 MR. MACK: -- what the composition of the materials

1 are that this bike was built of.

2 THE COURT: Okay.

3 BY MR. MACK:

4 Q So, sir, you don't know what kind of plastic it is?

5 A I've seen it referenced as grimald.

6 Q Do you know what point it melts at or deforms at?

7 A There's a reference to 325 degrees Fahrenheit.

8 Q How about 329 degrees, is that closer to the truth?

9 A That might be.

10 Q All right. What's the temperature of the exhaust
11 manifold or the exhaust pipes right here while operating at a
12 standstill on center stand at normal idle?

13 A It's got 300 degree Centigrade, so that's going to be
14 four something.

15 Q 300 degrees Centigrade. Well, I believe the document --
16 the testing document that you're -- says 300 to 310 degrees
17 Centigrade, is that right?

18 A Right.

19 Q And that translates to 572 degrees Fahrenheit to 590
20 degrees Fahrenheit, correct?

21 A Something like that, yes.

22 Q Something like that? What's a few hundred degrees
23 between friends, right? Tell me this --

24 MR. HEINOLD: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. MACK: Withdrawn. Tell me this --

2 THE COURT: Don't argue with the witness.

3 MR. MACK: Not my intention. Sorry.

4 BY MR. MACK:

5 Q You referenced a Yamaha manual. You told the jury that
6 you reviewed this Yamaha manual. It's 14-C.

7 MR. MACK: Can you put up 14-C, please, page two.

8 UNIDENTIFIED SPEAKER: Is that D?

9 MR. MACK: It's Defense 14-C.

10 (Pause)

11 BY MR. MACK:

12 Q There is a warning on the lefthand side, top lefthand
13 corner.

14 MR. MACK: If we could blow up that entire warning
15 caution box of it.

16 (Pause)

17 MR. MACK: Actually this -- yes, there you go.
18 Right. Correct. Well, the whole -- the whole square.

19 BY MR. MACK:

20 Q Let me ask you a question before we get to this. What --
21 did you examine one of these Yamaha motorcycles?

22 A Not for this case. I have not.

23 Q Was it important for you to know how that Yamaha --
24 Yamaha motorcycle failed in examining the warning?

25 A I don't know that it failed.

1 Q Or how it could fail?

2 A I mean, other than the matters that they identified, no.

3 Q Let me just understand something right now. Is it your
4 opinion that if you put risk of fire into any manual any place
5 it covers your butt if the fire -- if the product catches
6 fire?

7 A I think you'd have to look at the context of where --
8 what it's put on.

9 Q It's got to be the context, right?

10 A Sure.

11 Q In other words, it has to be a targeted one?

12 A Right.

13 Q You can't -- you don't get the benefit of just putting a
14 catchall in a manual and say, I mean, thank God it said risk
15 of fire because a fire occurred. I had no idea it could occur
16 that way, but thank God I put risk of fire. That doesn't help
17 you, right?

18 A Well, I think that if the goal is to communicate how a
19 person is to use the product to minimize the risk of fire
20 you'd want to address the use pattern.

21 Q Minimize the risk of fire? Tell me how a fire starts in
22 this bike if you idle it normally for 30 to 40 minutes, all
23 the ways that it could.

24 A I don't know. I'm not a fire expert. I've not looked at
25 all the possibilities.

1 Q If BMW told us that the only way it could is if this
2 plastic piece down here fails and leaks oil would that
3 surprise you?

4 A I've not gone through all the fire possibilities in the
5 bike.

6 Q How about the Yamaha? Do you know if that has a sight
7 glass or does it have a dipstick?

8 A It has a dipstick.

9 Q Okay. Do you know how that can cause a fire from
10 overheating itself?

11 A It does not say. It just simply says do not allow engine
12 to idle too long under the heading of prevent a fire hazard or
13 other damage, so I don't --

14 Q So that bike you can't let idle too long, right?

15 A Correct.

16 Q All right. That -- there's no warning saying you can't
17 let this bike idle too long can you -- normal idle?

18 A I thought that was what we were just talking about,
19 wasn't it?

20 Q You're talking about on page 51 under the catalytic
21 converter section?

22 A Right. Do you allow the engine -- it's not under the
23 catalytic, it's under the warning dealing with fire hazards.
24 Do not allow the engine to idle unnecessarily or for prolonged
25 periods.

1 MR. MACK: Can we pull up --

2 THE WITNESS: Risk of -- risk of overheating or
3 fire.

4 MR. MACK: -- 51 and put it next to this one?

5 (Pause)

6 MR. MACK: Excuse me. Put a side by side comparison
7 so we can take a look at the two.

8 (Pause)

9 BY MR. MACK:

10 Q While Dan is working his magic do you know if other
11 manufacturers -- you're a design expert of motorcycles?

12 A Yes.

13 Q Would you agree with Dr. Vigilante's premise that the
14 first goal of a bike manufacturer would be to design out any
15 risk of fire hazards -- design it out of the product if you
16 could?

17 A I would say in general the goal is to design out any risk
18 you can in general.

19 Q You agree with that?

20 A In general, yes.

21 Q All right. And so you -- do you think it was BMW's
22 responsibility to design out the risk of fire rather than warn
23 about it if that was possible, right?

24 A Well, design out the risk of fire under normal use
25 conditions, sure.

1 Q You keep saying this word normal use. That's not what
2 manufacturer's look at, is it?

3 A Within some range they have to. Sure.

4 Q They're looking for something called foreseeable use,
5 right?

6 A At some level, sure, but not a wide range.

7 Q And they perform things like extended use testing, right?

8 A Yes.

9 Q Because they know people are going to do it.

10 A It can happen. Sure.

11 Q And so they want to predict what people are going to do
12 and make sure that their bike can perform safely in the
13 circumstances?

14 A Right. They want to build in some margin. Sure.

15 Q They're just not trying to make it perform safely for the
16 -- for the 80 percent, the people -- most of the people who
17 use it exactly as they specify in their manual? That's not
18 what their intention is, right?

19 A Well, within some latitude they're trying to accommodate
20 minor variations on use pattern. Sure.

21 Q Minor variations like allowing a bike to idle at center
22 stand for 50 minutes? They want to make sure that it can idle
23 at center stand for 50 minutes safely. That's what BMW did
24 here, right?

25 A Well, they did a test to see what would happen there, but

1 that -- shouldn't expect that to be the normal use of a
2 motorcycle.

3 Q Well, they did a test and to pass it it said that you
4 can't have any heat damage on the motorcycle at all, no heat
5 damage on the bike. Do you recall that?

6 A They don't say that's to pass it. They just note that
7 there was no heat damage.

8 Q Oh, no, sir. I actually -- we're going to come back to
9 that point in just one second. Let's look right here. Those
10 two warnings, the warning that you reference in the Yamaha.
11 Let me get out of the jury's way. The warning you reference
12 in the Yamaha is the warning under the catalytic converter
13 section, right?

14 A It's under --

15 THE COURT: You mean in -- in --

16 MR. MACK: The Yamaha.

17 THE COURT: The Yamaha's under catalytic converter?

18 MR. MACK: Well, it's on the screen.

19 BY MR. MACK:

20 Q So you can tell us if it's under the catalytic converter
21 section or not?

22 A It's under the panel that starts catalytic converter.

23 Q Right. And the warning on our bike -- on this -- the
24 warning in the manual is -- on the R1150R is under the
25 catalytic converter section, right?

1 A Well, it starts with that, but then moves to other
2 topics.

3 Q Right. And you don't have any -- well, okay, you're
4 entitled to your opinion.

5 THE COURT: The jury has the book.

6 MR. HEINOLD: Objection, Your Honor.

7 MR. MACK: Yes.

8 THE COURT: They can make their own determination.

9 MR. MACK: The jury will make that determination.

10 BY MR. MACK:

11 Q Let me ask you this. On a bike with a -- with a
12 dipstick, right, can the bike while just idling catch fire?

13 A I guess it's possible if it gets hot enough that certain
14 things will deteriorate.

15 Q You've never in your -- how long have you been at this?
16 How long have you been doing this work?

17 A About 40 years.

18 Q Never in your 40 years have you had such a case?

19 A I don't investigate fires.

20 MR. HEINOLD: Objection, Your Honor. It's beyond
21 what the witness has been called for.

22 THE COURT: What's your reply?

23 MR. MACK: I disagree, Judge.

24 THE COURT: I know you disagree, but why?

25 MR. MACK: The witness talked about his experience

1 and how he's so well qualified, so well versed with the
2 failure modes, the hazard presented by motorcycle operation
3 that he actually can design motorcycles. I'm entitled to know
4 what his experience is about motorcycle failures.

5 THE COURT: He said he's never known of one to catch
6 on fire --

7 MR. MACK: Well --

8 THE COURT: -- with a dipstick.

9 MR. MACK: In 40 years.

10 THE COURT: Okay.

11 MR. MACK: Right.

12 THE COURT: So you can argue what you want from
13 that.

14 THE WITNESS: Right. And this is the only one I've
15 worked on with a motorcycle standing still without one.

16 BY MR. MACK:

17 Q And you've never seen any testing documentation to prove
18 that an air -- an oil-cooled engine with a dipstick can catch
19 fire while idling at center stand for 30 or 40 minutes?

20 A No, I've not.

21 Q Do you know that other manufacturers build their bikes
22 with oil sight glasses made of actual glass?

23 A I'm aware some do, yes.

24 Q Are you aware of any other manufacturer in the world that
25 uses the plastic that BMW used for their oil sight glass?

1 A Offhand I don't.

2 Q No, you don't?

3 MR. HEINOLD: Objection.

4 MR. MACK: Tell me -- tell me --

5 THE COURT: What's the objection?

6 MR. HEINOLD: There's no proof of the implication of
7 his question.

8 THE COURT: Well, he's an expert. He asked him if
9 he knew, so I'll allow it. He said he didn't know.

10 BY MR. MACK:

11 Q Tell me this. Is the oil sight glass made of plastic in
12 this application a unique characteristic of the BMW 1150R in
13 your mind?

14 A Relative to what? I'm not sure what you mean there.

15 Q Every other bike you've ever examined in your life?

16 A Offhand I don't know.

17 Q Well, you do know that you've never seen one before like
18 this, right, with a plastic sight glass?

19 A I don't know if I have or not. I've seen motorcycles
20 with sight glasses, whether they're made of some plastic or
21 glass derivative, I don't know. I've not gone door to door to
22 check every one of them.

23 Q Well -- and you've never heard of fire occurring, right?

24 THE COURT: All right. We've covered -- we've
25 covered this.

1 BY MR. MACK:

2 Q Well, I want to know what your basis is for saying that
3 the bike is not defectively designed?

4 A Well, based on what I've seen if the bike is used in the
5 manner that it's described and intended to be used in the
6 owner's manual, or even some variation of that, there's a
7 very, very low, if almost zero, risk of a fire if you follow
8 the instructions that are intended to be followed -- followed.

9 Q All right. And you're not telling the jury that this
10 hazard could not be designed out of this bike, right? You're
11 not telling the jury that?

12 A No, but I'm saying if you let an engine run long enough
13 and it gets hot enough then bad things are going to happen.

14 Q Bad things are going to happen. Well, I need to stick
15 specific to this bike. So what bad things are going to happen
16 to this bike if you let it idle from 30 or 40 minutes on
17 center stand in the stationary position in a garage like Mr.
18 Yazdani?

19 A Well, the engine's going to overheat and then what
20 happens from there depends on a lot of things. I don't know.
21 I didn't investigate this fire to determine what happened.

22 Q All right. Let me ask you a hypothetical. You -- if you
23 learned that this was the only bike in the world that had a
24 plastic sight glass, okay, the only 1150R motorcycle like
25 this, oil twin, hose box or engines, oil-cooled, that has an

1 oil sight glass like this made of plastic would that affect
2 your opinion?

3 MR. HEINOLD: Objection, Your Honor. The reason is
4 he's injecting into a hypothetical something he's acting as
5 true and there's no proof of its truth.

6 The question had been regarding what information --
7 whether other people used it or not and I objected to the last
8 question and it's the same problem here.

9 Mr. Mack is expressing it as if that's the truth and
10 he's not allowed to do that if he doesn't have proof that
11 that's the truth.

12 MR. MACK: This is a motorcycle design expert,
13 Judge. I'm just asking him if the composition of the plastic
14 sight glass matters to him as to whether --

15 THE COURT: All right. Ask him that. You can ask
16 him that.

17 BY MR. MACK:

18 Q Does that matter, the composition of the plastic sight
19 glass?

20 A Well, not in and of itself.

21 Q All right.

22 A Because it depends on how it's being used, how the
23 motorcycle's intended to be used, that type of thing.

24 Q In this application you tell me does it matter whether
25 it's plastic or glass?

1 A In and of itself, no, because it depends on everything
2 else in the system.

3 Q Mr. Yazdani's not the only person in your experience who
4 starts his bike up in the wintertime to turn the fluids and
5 make sure the engine stays in shape, right?

6 A I'm familiar with that, yes.

7 Q All right. So that's not -- that's not extraordinary?
8 You've heard of that before?

9 A Sure.

10 Q Okay. And there's nothing in the manual that says you
11 can't do that, right?

12 A Correct.

13 Q All right.

14 MR. HEINOLD: I'm sorry, can't do what?

15 THE COURT: Can't do that.

16 MR. MACK: Can't do that.

17 BY MR. MACK:

18 Q Can't start his bike on center stand idle to turn it over
19 to winterize it? There's nothing that tells you that?

20 A No.

21 (Pause)

22 BY MR. MACK:

23 Q Now, 1997. Well, let's get back to this just so we can
24 get off the topic completely. You don't know anything more
25 about the bike from which this warning came, right, this

1 Yamaha?

2 A I mean, I'm generally familiar with it. I don't know
3 much beyond that. I mean, I've ridden one I'm sure, but
4 beyond that, no.

5 Q Right. Nothing about the engineering or design or any of
6 that?

7 A No, not in terms of this part of the bike, no.

8 MR. MACK: All right. Let's take that off. Let's
9 go to the 1997 customer satisfaction notification.

10 UNIDENTIFIED SPEAKER: P-53?

11 MR. MACK: 63.

12 UNIDENTIFIED SPEAKER: 63.

13 MR. MACK: P-63.

14 BY MR. MACK:

15 Q Now, in -- are you aware that in 1997 BMW learned that
16 one of its motorcycles when idling at high speed at a
17 standstill could catch fire? Are you aware of that?

18 A Yes.

19 Q All right. And BMW at the time had in its manual for
20 that bike to start up and drive away immediately, right?

21 A That's not my recollection specifically of what was in
22 that manual. What section are you referring there?

23 Q Well, why don't we just take a look down here at page two
24 of this exhibit?

25 A What -- what are you looking at?

1 Q I'm going to show you.

2 A Okay.

3 Q I'm going to pull it up.

4 MR. MACK: Number five.

5 (Pause)

6 BY MR. MACK:

7 Q All right. Now, can you read the screen? If not, I'll
8 come over here and hand this to you. I want you to be able to
9 see this.

10 A No, I think I've got the document that you're looking at.

11 Q Number five?

12 A Okay.

13 Q Did the -- did the owner's manual in the 1997 RSL warn
14 riders not to let their bike idle?

15 A That's what it says there, yes.

16 Q It says that they -- the owner's manual, the involved
17 models warns the rider not to leave the engine running
18 unnecessarily, right?

19 A Right.

20 Q Does this manual warn the rider not to leave its bike
21 running unnecessarily?

22 A This meaning?

23 Q The 1150R, Mr. Yazdani's bike?

24 A Yes.

25 Q It says the word running?

1 A It doesn't use those words, but it says to ride away
2 immediately after starting the engine.

3 Q All right. So BMW in 1997 already knew that it had that
4 instruction in its manual for the R1100's, right, the RSL's?

5 A Right.

6 Q Okay. And what happened?

7 MR. HEINOLD: I didn't hear the question.

8 MR. MACK: What happened?

9 BY MR. MACK:

10 Q What happened to the bikes out -- the RSL's out there in
11 the world where it said in the manual don't leave them running
12 unattended?

13 A There were apparently some of them that a situation where
14 the fairing trapped the heat and a fire ensued.

15 MR. MACK: Well, let's go down to number six and
16 let's blow up from starting with the word initially.

17 (Pause)

18 BY MR. MACK:

19 Q Initially the cause of these incidents could not be
20 determined since no vehicle malfunction or defect is involved.
21 After investigating the incidents and learning that many of
22 the owners reported that their vehicles had been left
23 unattended at engine speeds above idle BMW conducted further
24 analysis to evaluate the effects of such operation. Are you
25 familiar with that?

1 A I've -- I've seen this document.

2 Q All right. Let's finish that sentence. BMW ultimately
3 found that -- oh this is where it skips. Operating in such a
4 manner overheating could occur and the heat generated could
5 eventually cause fairing components to catch fire, is that
6 right?

7 A That's what it says.

8 Q As a result BMW decided to conduct a customer
9 notification campaign, right?

10 A Right.

11 Q And in that situation the riders of the motor vehicles,
12 the RSL's, didn't know that they had plastic fairings that
13 could catch fire, right, when exposed to excessive idle?

14 A I would presume so.

15 Q All right. And so BMW took the steps necessary to make
16 those riders aware of that unique hazard, right?

17 A Yes.

18 Q And what did they do?

19 A They sent a notification to customers.

20 Q Okay. So they sent a detailed explanation of what the
21 problem was, right?

22 A Right.

23 Q And then what else did they do?

24 A They also --

25 THE COURT: Why don't you -- why don't you lead him

1 on that. All right.

2 BY MR. MACK:

3 Q They also included a warning label to affix to the bike,
4 right?

5 A Right.

6 Q Well, where did they have that warning label? Where did
7 they instruct customers and BMW dealers throughout the country
8 to affix that warning label?

9 A I believe it's up on the steering head.

10 Q Now, is it your opinion that BMW would have had no
11 responsibility to do that, to send a warning label to
12 customers to remind them because it was already in the manual?

13 A No, because I think that's -- they had a little bit
14 different situation there in that they had an unusual fire
15 pattern that they uncovered with 1,200 or so bikes in the
16 field.

17 And so rather than sending them, you know, a
18 different manual that addressed that in different language
19 they had -- they either -- which would not have been a good
20 idea because you have two manuals, what do you do with it --
21 they decided to supplement the manual with an on-product
22 sticker for those bikes.

23 Q Well they actually sent a manual too, right?

24 A At a later date they developed a different manual, yes.

25 Q No.

1 MR. MACK: Let's pull up -- let's continue in that
2 exhibit. Let's go to page three --

3 UNIDENTIFIED SPEAKER: What page number?

4 MR. MACK: Page three.

5 (Pause)

6 MR. MACK: Four, sorry. Let's go to description of
7 remedy down at the bottom and let's blow it up where -- where
8 it continues on the next page like you did for --

9 BY MR. MACK:

10 Q Why don't you -- in the meantime, sir, could I ask you to
11 read page four, the draft recall letter, the customer
12 notification letter. The bottom of the page says description
13 of remedy.

14 A Right.

15 Q All right. So now the remedy actually involved sending
16 this letter which has above the section -- above the section
17 has a description -- specific description of the problem
18 encountered, right?

19 A Right.

20 Q And then the remedy was to not just tell folks about it
21 with the targeted letter, but to also give them a warning
22 label, right?

23 A Right.

24 Q And then to give them two manual inserts, right?

25 A Well, it depended on which manual they had what insert

1 they got.

2 Q So that you got a manual insert. So they changed the
3 manual right then and there?

4 A Right. But they had people in the field that had a
5 manual that they needed to correct.

6 Q All right. Now, you're familiar with -- BMW stopped
7 manufacturing that bike, right?

8 A Right.

9 Q We talked about the engineering hierarchy. We talked
10 about how you have to design out a hazard before you can guard
11 against it or warn, right?

12 A Well, it all works together, but you -- to the extent you
13 can design out risk that's always a good thing.

14 Q Okay. And that's what BMW did in 1997. They designed
15 out the risk by stop -- they stopped making that bike with the
16 fairings, right?

17 A That's my understanding, yes.

18 Q And then to the extent they were already in the world
19 they warned about the specific hazard that riders would
20 encounter if they continued to use the bike, right?

21 A Yes.

22 Q They did that because it was a unique characteristic of
23 that bike, right?

24 A Yes.

25 MR. HEINOLD: Objection, Your Honor.

1 THE COURT: What's the objection?

2 MR. HEINOLD: The issue is the Court's order limited
3 the warning.

4 THE COURT: Notice you mean?

5 MR. HEINOLD: The response of the warning.

6 THE COURT: All right. Well, I think we've covered
7 it in any event, so let's move on.

8 BY MR. MACK:

9 Q Here's a plastic piece next to --

10 MR. HEINOLD: Objection.

11 THE COURT: What's the objection there?

12 MR. HEINOLD: The same one. He's not talking
13 about --

14 THE COURT: Are you talking about this bike or the
15 other bike?

16 MR. MACK: I'm talking about this bike right here.
17 The 1150R.

18 THE COURT: What's your question?

19 MR. MACK: The question is about the plastic piece
20 and whether that represented a specific hazard just like the
21 plastic fairings represented a specific hazard.

22 THE COURT: Sir?

23 THE WITNESS: Well, I don't know the extent to which
24 the plastic fairings represented a specific hazard during
25 normal use, but the plastic piece that you've been referring

1 to here from what I can see does not represent a risk when the
2 vehicle's being used in a normal manner.

3 Now, is there a risk of the engine overheating if
4 allowed to run for too long? Sure.

5 MR. MACK: Okay.

6 (Pause)

7 MR. MACK: Just one moment, Your Honor.

8 (Pause)

9 BY MR. MACK:

10 Q You're aware that Mr. Yazdani read his manual, correct?

11 A That's what he testified to.

12 MR. HEINOLD: Couldn't hear him, Your Honor.

13 THE COURT: Mr. Yazdani read his manual.

14 MR. MACK: I said you're aware that Mr. Yazdani read
15 his manual, correct?

16 BY MR. MACK:

17 Q Are you aware of that?

18 A Yes, that's what he testified to.

19 Q And do you know why he read it?

20 A I guess I --

21 THE COURT: He can't answer that.

22 MR. MACK: Well, he testified why he read it.

23 THE COURT: Did he -- did you read where he said why
24 he read it?

25 THE WITNESS: Offhand I don't recall.

1 THE COURT: All right. He doesn't recall.

2 BY MR. MACK:

3 Q Was Mr. Yazdani looking for specific information about
4 the operations of his motorcycle when he was reading --
5 reading the manual?

6 A I think he indicated he looked through the entire manual,
7 so I don't -- I don't know that he's looking for specific
8 information.

9 Q And you weren't here when Mr. Yazdani testified earlier
10 this week?

11 A No.

12 Q Right? You were not here?

13 A I've read his deposition where he said he read the manual
14 completely, yes.

15 Q All right. And did you read his entire transcript?

16 A Yes.

17 Q Is that the only time he talks about reading the manual?

18 A No.

19 Q Okay. He talks about it at other points where he says,
20 now I didn't read every word, right?

21 A Well, he says he didn't remember. At later points I
22 might have read it. I don't recall reading that particular --
23 I mean, I probably did. That's what he says. He says he read
24 it completely in the other part.

25 Q In your mind if a bike or any product has a unique

1 characteristic that makes it exceptionally dangerous compared
2 to other problems -- similar problems is -- is the unique
3 character device something that should be warned about
4 specifically?

5 MR. HEINOLD: Objection.

6 THE WITNESS: It depends a lot --

7 THE COURT: What's the objection? I don't even know
8 what the question means. I'm going to sustain it.

9 MR. MACK: Okay.

10 THE COURT: All right.

11 BY MR. MACK:

12 Q Unique design characteristics that present a hazard are
13 something that should be warned about specifically in your
14 mind?

15 A In general it needs to be reviewed from that possibility,
16 yes.

17 Q And it's not absurd or unreasonable for a manufacturer to
18 put a warning label advising a motorcycle rider say that there
19 is a unique design characteristic of this bike that may cause
20 you to change your behavior about how you normally use the
21 bike?

22 A The question being it's not absurd for them?

23 Q Yes or unreasonable?

24 A Well, I think there's other ways to handle it which is
25 traditionally the way the motorcycle industry has handled it

1 and that's through owner's manuals.

2 Q Or like BMW where they sent the label, right?

3 THE COURT: All right. We've been through all this.
4 We've covered all of this.

5 (Pause)

6 THE COURT: Do you have any brief redirect?

7 MR. HEINOLD: Oh, is he finished?

8 THE COURT: I think he is.

9 MR. MACK: I'm almost done.

10 (Pause)

11 MR. MACK: Judge, just very quickly.

12 BY MR. MACK:

13 Q Does this -- does this bike have -- strike that. Do all
14 bikes have the same warnings on them -- labels?

15 A There are --

16 Q All motorcycles?

17 A There are some common labels or label themes that are
18 required by law.

19 Q All right.

20 A Yes.

21 Q And others manufacturers can decide to put on a bike,
22 right?

23 A Yes.

24 Q To keep their rider safe?

25 A Or whatever reason that they decide to put labels on.

1 Q All right. You prepared an exhibit that had how many
2 labels?

3 A I think I counted 20 or 22.

4 Q All right. Do all of those labels in your mind represent
5 critical safety information that a rider needs to keep himself
6 safe?

7 A Well, it's all safety related information at some level.

8 Q All safety related? Is any of it unique to a particular
9 design or is it all common characteristics that are
10 encountered by users when they operate all motorcycles?

11 A I would say in general these are common types of issues.

12 MR. MACK: Okay. Those are all the questions I
13 have. Thank you.

14 MR. HEINOLD: I have some.

15 REDIRECT EXAMINATION

16 BY MR. HEINOLD:

17 Q Can I ask you to turn to page 51 of the manual?

18 MR. HEINOLD: I'm not going to put it up, Your
19 Honor. I think we've probably all memorized it by now.

20 BY MR. HEINOLD:

21 Q And that says ride away immediately, don't -- don't idle
22 for a prolonged period of time?

23 MR. MACK: Objection to the form. It's not what it
24 says.

25 BY MR. HEINOLD:

1 Q All right. Would you read what it says at the bottom,
2 please?

3 A Do not allow the engine to idle unnecessarily or for
4 prolonged periods. Risk of overheating or fire. Ride away
5 immediately after starting the engine.

6 Q Now, you don't understand that to mean that somebody has
7 to turn the engine on and jump on it before the few seconds it
8 takes a fuel-injected engine to -- to warm up a little bit, do
9 you?

10 A Right. The word is --

11 Q Immediately?

12 A The word is unnecessarily. So if it takes 10, 15 seconds
13 to get everything up to snuff, that's fine.

14 Q So you think that authorizes someone who reads that, or
15 would authorize them in their own mind, someone who reads
16 that, to let a bike run 30 or 40 minutes?

17 A No.

18 MR. HEINOLD: Okay. Can we have P-126 up, please?
19 You guys have it.

20 MR. MACK: Sorry.

21 MR. HEINOLD: Okay. We have to switch it.

22 MR. MACK: We just switched it over. Hold on.

23 MR. HEINOLD: Sorry. And I want you to put the two
24 pieces of it.

25 (Pause)

1 BY MR. HEINOLD:

2 Q While he's doing that let me ask you this. You said this
3 had an oil cooler?

4 A Yes.

5 Q Okay. And it's an air-cooled engine?

6 A Right.

7 Q No radiator? No water cooling?

8 A That's correct.

9 Q Okay. Does the fact that it has an oil cooler mean it
10 still won't get hot?

11 A No.

12 Q Does it mean it still won't overheat?

13 A No.

14 Q Does it mean it still doesn't run the risk of having a
15 fire if you let it run unattended for 30, 40 minutes?

16 A No.

17 Q Does the activity of starting the bike up and turning it
18 over, winterizing it from -- you know, from that standpoint,
19 activities in the winter, does that include running it 30 or
20 40 minutes unattended?

21 A I would certainly think not.

22 Q Are you surprised that a sight glass or any other thing
23 would ultimately deform or fail if a motorcycle is left to run
24 30 to 40 minutes attended?

25 A I would think at some point in time a nine or 10-year-old

1 motorcycle running for a half an hour or so the potential for
2 something bad happening exists.

3 Q Okay. Now, I want to go to this -- this document, this
4 test report. You said this was a new vehicle?

5 A Yes.

6 Q And it's -- it's -- is this considered an extreme test?

7 A Yes.

8 MR. MACK: Objection.

9 THE COURT: What's the objection?

10 MR. MACK: Well, I don't know how he knows that. He
11 hasn't laid a foundation at all for that.

12 MR. HEINOLD: He's -- he's aware of testing in the
13 industry, so --

14 THE COURT: What is an extreme test?

15 MR. HEINOLD: He --

16 THE COURT: What does that mean?

17 MR. HEINOLD: Extreme.

18 THE COURT: Yes. What does that mean? Do you know
19 what that means?

20 THE WITNESS: Yes. What they characterize this as
21 is an extended in-use, so they're extending the use pattern of
22 the -- of the engine.

23 BY MR. HEINOLD:

24 Q This is beyond normal use?

25 A Right.

1 Q And they're seeking information?

2 A Right.

3 Q Okay. And at the bottom of this when they're reporting
4 on the condition and the test results of this new vehicle they
5 then say other factors are synchronization of the two
6 cylinders. Bad synchronization has great effect on exhaust
7 temperatures, engine setting in general, motorcycle on the
8 side stand and ambient temperature. How do those things
9 affect the rate of heat and the increase of heat in that type
10 of test?

11 MR. MACK: Judge, he has no foundation. Objection.

12 THE COURT: All right. Well, I think we've been
13 over it in any event.

14 MR. HEINOLD: Well, Your Honor, I asked --

15 THE COURT: We're getting repetitive.

16 MR. HEINOLD: He opened it up. We're not
17 repetitive.

18 THE COURT: Well, I think we are, so I'll sustain
19 it.

20 MR. MACK: Thank you, Judge.

21 THE COURT: All right.

22 BY MR. HEINOLD:

23 Q You were asked if you were aware of other fires in other
24 motorcycles and that's not generally what you do, correct?

25 A Correct, I'm not a fire investigator.

1 Q Okay. Would you know? Do you have access to the fire
2 experience of other motorcycle -- motorcycle manufacturers?

3 A No.

4 Q Would anybody except the motorcycle manufacturers?

5 A I don't know how else you would know other than you're
6 the manufacturer.

7 Q All right. You were --

8 MR. HEINOLD: Can we get D-2, D-3 back up, please,
9 quickly?

10 (Pause)

11 BY MR. HEINOLD:

12 Q Looking at D-2, D-3 you were asked about whether they
13 cover turning the engine over. When you -- when you hear
14 turning the engine over like Mr. Yazdani was doing what does
15 that mean to you?

16 A Starting the engine.

17 Q Does it mean letting it run at idle for 30 to 40 minutes
18 unattended?

19 A No.

20 Q Do these warnings cover that?

21 A Yes.

22 Q Do they tell you not to do it?

23 A Yes, they do.

24 Q They're clear?

25 A Very clear.

1 Q The -- the 1997 customer service action regarding the RSL
2 vehicles with the -- with the fairings, did those warnings in
3 the manuals that were being supplemented contain any
4 information about the risk of fire?

5 A No.

6 Q Did the supplement talk about the risk of fire?

7 A The supplement meaning?

8 THE COURT: The stuff they mailed out.

9 MR. HEINOLD: The manual insert.

10 THE COURT: The insert.

11 THE WITNESS: No.

12 BY MR. HEINOLD:

13 Q Did the -- did the manual insert add to the warning of
14 the risk of fire?

15 A It doesn't appear that they do.

16 Q Let me --

17 A Unless I'm looking at the wrong page here.

18 Q Let me see if I can find it.

19 THE COURT: Well, it's all in evidence already, so
20 why are we --

21 MR. HEINOLD: This is my last question.

22 THE COURT: I know. But why are we having him go
23 over this when we already know the answers?

24 (Pause)

25 BY MR. HEINOLD:

1 Q Page? What is it?

2 A Page eight.

3 Q Okay. Did that new warning add to it information much
4 like what's here in discussing the risk of fire?

5 A Yes, it does.

6 MR. HEINOLD: Okay. That's all I have, Your Honor.

7 THE COURT: All right. Jurors, anybody have any
8 questions to have any testimony clarified from this witness?

9 Excuse us one second, sir. Dennis, could you grab
10 those for me? Thank you.

11 (Pause)

12 THE COURT: Thanks, Dennis.

13 COURTROOM DEPUTY: You're welcome, Judge.

14 (Pause)

15 EXAMINATION

16 BY THE COURT:

17 Q All right. Sir, do you know if it's possible for a
18 motorcycle engine to increase idle on its own? For example,
19 without human adjustment?

20 A Not a motorcycle that's running properly. No.

21 Q Okay.

22 MR. MACK: I didn't hear the answer to that.

23 THE COURT: Not a motorcycle that's running
24 properly.

25 BY THE COURT:

1 Q Are you aware of how some people advocate starting
2 motorcycles and warming them up during the winter to avoid
3 damage? Are you aware of that?

4 A Yes, I spent my tour of duty in Michigan and Illinois
5 before I moved to Florida, so I --

6 MR. MACK: I can't hear that, Your Honor.

7 THE WITNESS: I said lived in Michigan and Illinois
8 before I moved to Florida, so I'm familiar with starting
9 vehicles in the wintertime.

10 BY THE COURT:

11 Q So do you agree that this should be done to motorcycles?

12 A That's not the best thing to do.

13 Q Okay. Did you do it?

14 A No, I pulled the battery and stabilized the fuel.

15 THE COURT: Okay. All right. Any follow-up on any
16 of those questions?

17 MR. MACK: No, Judge.

18 MR. HEINOLD: No.

19 THE COURT: Okay. Sir, thank you. Have a safe trip
20 back to Florida.

21 (Pause)

22 THE COURT: Any other evidence for the defense?

23 MR. HEINOLD: No, Your Honor.

24 THE COURT: Plaintiff, any rebuttal?

25 MR. MACK: Judge, I think we're done. Thank you.

1 THE COURT: Okay. All right, jurors. What that
2 means is the presentation of evidence has concluded. What
3 we're going to do now is I'm going to give you law. You don't
4 have to take any notes on it.

5 You can take your time, sir.

6 THE WITNESS: All right.

7 MR. MACK: Judge, can we have a break before we do
8 -- you instruct on the law?

9 THE COURT: All right. We'll resume at 4:00 then.
10 We'll take a 10 minute break.

11 MR. MACK: Thank you, Judge.

12 THE COURT: Thank you, sir. You can step down.

13 (Pause)

14 THE COURT: What time is your flight?

15 THE WITNESS: 6:30.

16 THE COURT: Direct to RSW?

17 THE WITNESS: Yes.

18 (Jury exits, 3:49 p.m.)

19 THE COURT: All right. Anything we have to talk
20 about?

21 MR. MACK: Yes, just -- we were looking at the
22 factual cause charge and we looked at the proposed -- the
23 model jury instruction. One of the questions we had, Judge,
24 is --

25 THE COURT: What page?

1 MR. MACK: -- the jury --

2 THE COURT: What page?

3 MR. MACK: Page six.

4 (Pause)

5 MR. MACK: There's nothing in the -- in this charge
6 to let the jury know that if they find that the defective
7 product is a factual cause of the harm, in addition to Mr.
8 Yazdani's whatever they want to think he did, careless,
9 whatever, his conduct also was a cause of the harm that in
10 that case they still are required to find that the product was
11 defective and caused his harm because it has to be --

12 THE COURT: Well, that's implicit because there's no
13 reference to comparative negligence for the strict liability
14 claims.

15 MR. MACK: It's implicit to us.

16 THE COURT: You can argue that.

17 MR. MACK: I don't know if it -- I don't know if the
18 layperson understands. They may think that they have to
19 choose between Mr. Yazdani's conduct and the strict liability
20 of the product and that's not the law.

21 THE COURT: I don't know how they could do that
22 given the way the instructions are written and the jury
23 questions are asked. I mean, we spent time fixing that.

24 MR. MACK: I don't disagree.

25 THE COURT: You can certainly argue that -- that the

1 comparative negligence only applies to the negligence piece,
2 not the strict liability. That's certainly the situation
3 we're presenting them with.

4 You want -- you, I take it want me to say under --
5 on page -- top of page six somewhere that -- or somewhere in
6 the comparative negligence section that doesn't -- that only
7 applies to negligence, not strict liability?

8 MR. MACK: The instruction that I would prefer that
9 you give is if you find that the product was defective the
10 defendant is liable for all harm caused to the plaintiff by
11 such defective condition.

12 In order for the plaintiff's to recover in this case
13 the defendant's defective product must have been a factual
14 cause of plaintiff's claim. A defective condition is the
15 factual cause of harm if the harm would not have occurred
16 absent the defect.

17 The defect does not have to be sole cause of
18 plaintiff's harm even if other actions or events, including
19 those by plaintiffs, contributed to or partially caused
20 plaintiff's harm. If the harm would not have occurred if the
21 product was free from defect then defendant's product
22 factually caused the accident. And that's -- that's the
23 charge approved by the cases. It's Reott. It's the
24 Pennsylvania Standard Jury Instruction 16.70, 2015. It's
25 Reott versus Asia Trend, Inc.

1 THE COURT: Why are just telling me this now?
2 That's what I don't understand. We've had like six
3 conversations on this.

4 MR. MACK: Judge, if it -- I understand that you
5 know that we're working very hard on all aspects of this case
6 at all times. Virtually 24 hours a day. I don't want to get
7 the charge wrong after all this work.

8 THE COURT: I gave you the charge a week ahead of
9 time, a week, and you're telling me two minutes before --
10 three weeks -- two weeks -- two minutes before I'm going to
11 charge you're telling me I have to rewrite the whole charge.

12 MR. MACK: We made changes this morning. We made
13 changes this afternoon.

14 THE COURT: We didn't change this. We didn't change
15 causation.

16 MR. MACK: We changed other parts of the charge.

17 THE COURT: We didn't touch this section. Do you
18 want me to add a section that says under -- I'll add a section
19 that says under comparative negligence that this does not
20 apply to the failure to warn and design defect provision. If
21 that's what you want me to add I'll add it. Is that what you
22 want?

23 MR. MACK: Yes, Your Honor.

24 THE COURT: I mean, I can't rewrite the whole charge
25 now because --

1 MR. MACK: And I apologize.

2 THE COURT: -- I think everything you've read is in
3 there except for maybe one sentence. Which sentence do you
4 want?

5 MR. MACK: In no way am I intending to spring this
6 on you. It's the last -- it's that last part. It's that last
7 -- even if other actions or events, including those by
8 plaintiffs, contributed to or partially caused plaintiff's
9 harm, if the harm would not have occurred if the product was
10 free from defect then defendant's product factually caused the
11 accident.

12 MR. HEINOLD: The problem I have, Your Honor, is
13 first of all, the standard jury instructions are not binding.
14 And as a matter of fact some of them are --

15 THE COURT: No, I understand, but the point is not a
16 frivolous one and the question is whether I add it in
17 causation or whether I add it in comparative negligence.

18 MR. HEINOLD: However, the point is that you've made
19 the point by saying as a defense to the negligence claim and
20 you don't have it in the strict liability.

21 THE COURT: I understand, but that's a -- that's a
22 lawyer's reading of it and we're lawyers and I don't think
23 these eight people will pick up that distinction.

24 So, all right, I'll add the last sentence that you
25 read to the end of -- if you want it in factual cause, that's

1 on page -- the end of page six, is that where you want it?

2 MR. MACK: Causation -- the defective product is the
3 factual cause -- the factual cause -- after -- on the first
4 paragraph after -- after a factual cause cannot be an imagined
5 -- imaginary or fanciful.

6 THE COURT: All right.

7 MR. MACK: After that sentence.

8 THE COURT: I'll add it there.

9 MR. HUGHES: What page are we on? I'm lost.

10 THE COURT: Pardon me.

11 MR. MACK: Page six.

12 MR. HUGHES: I'm lost at the last minute.

13 MR. MACK: I have the language here.

14 (Pause)

15 THE COURT: Where is this provision in? I'm looking
16 at the suggested --

17 MR. MACK: He's looking at (G) causation. I'm not
18 sure what he's --

19 THE COURT: I'm looking at factual causation, 16.70
20 in the form instructions. What are you looking at?

21 MR. HUGHES: We seem to have different pages we're
22 looking at.

23 MR. MACK: No, no, no, I think -- I think Patrick
24 was looking at an earlier version. That's all.

25 MR. HUGHES: That's what I got from the Court.

1 MR. MACK: (G) causation. Yes, this is the one you
2 handed up. It's page six. Here, I'll show you.

3 THE COURT: Page six of part two.

4 MR. MACK: Page six of --

5 THE COURT: And then the carryover paragraph.

6 MR. MACK: That's right.

7 THE COURT: It's two paragraphs above negligence.
8 No, I'm looking at the form from Pennsylvania. I don't see
9 the language you just read to me.

10 MR. MACK: Oh, the language --

11 UNIDENTIFIED COUNSEL: The language is from Reott.

12 MR. MACK: The language -- the beginning part is
13 from the form and then the second part is from the case.

14 THE COURT: Well, the standard form in Pennsylvania
15 doesn't say that.

16 MR. MACK: The beginning part does. The second --
17 the second part is from Reott which I cite. I'm not --

18 THE COURT: You told me that the standard form --

19 MR. MACK: I said -- I said the standard form in
20 Reott and I cited Reott. I'm not -- I'm not trying to pull a
21 fast one, Judge.

22 THE COURT: I'm just trying to follow the standard
23 form and I don't see that language that you read. The
24 Pennsylvania form 16.7 doesn't say that. Does it?

25 MR. MACK: There were two citations on the -- on the

1 recommended charge. The one was the standard jury
2 instruction. The other was Reott versus Asia Trend.

3 UNIDENTIFIED COUNSEL: Well, I'm confused, Your
4 Honor, because --

5 MR. MACK: We got the --

6 UNIDENTIFIED COUNSEL: Oh, we've got wrong one.

7 MR. MACK: This is the new one from this afternoon.

8 UNIDENTIFIED COUNSEL: This is not --

9 MR. MACK: From this late afternoon, right?

10 LAW CLERK: Right.

11 MR. MACK: Okay.

12 LAW CLERK: Did I not give you guys the same one?

13 MR. MACK: So that's where the page difference is
14 coming from.

15 LAW CLERK: You both should have the same one.

16 (Pause)

17 THE COURT: It's the same language. We never
18 changed it.

19 MR. MACK: Right. I understand that.

20 THE COURT: Do you see the -- we're in the paragraph
21 (F) causation. And he wants to add a sentence at the end of
22 that first paragraph from a case.

23 MR. HEINOLD: That says what?

24 THE COURT: Read it again.

25 MR. MACK: Even if other actions or events,

1 including those by plaintiffs, contributed to or partially
2 caused plaintiff's harm, if the harm would not have occurred
3 if the product was free from defect then defendant's product
4 factually caused the accident.

5 THE COURT: I mean, that seems to be an accurate
6 statement of the law to me.

7 MR. HEINOLD: Okay.

8 THE COURT: Pre-Tincher. So give that language to
9 Leslie.

10 MR. HEINOLD: Well, it's pre-Tincher. That's part
11 of -- part of our problem.

12 THE COURT: Well, I know.

13 MR. HEINOLD: I'll note --

14 UNIDENTIFIED COUNSEL: I made my comments.

15 THE COURT: Right. All right. I'll add that
16 sentence. Just give that to Leslie. We'll add it and then
17 I'll --

18 LAW CLERK: Is it in your proposed?

19 THE COURT: I'm sorry. Is it in your proposed
20 instruction?

21 LAW CLERK: I don't see it.

22 MR. MACK: No.

23 THE COURT: Hence the problem.

24 MR. MACK: Wait. No, no, no, this last -- the last
25 sentence is not part in -- part of our proposed instruction.

1 THE COURT: All right. Why don't you --

2 MR. MACK: The first part was.

3 THE COURT: -- give Leslie the cite of where that it
4 is and we'll add it.

5 (Pause)

6 THE COURT: Just give us the page and the case and
7 where it is. And then make sure you show it to the defendant.

8 LAW CLERK: So this was not submitted?

9 MR. MACK: No, the first part of that was submitted.

10 THE COURT: Well, the part you want me to add was
11 not submitted. That's all we're saying.

12 MR. MACK: Yes.

13 LAW CLERK: So which part? We're not adding all of
14 this?

15 MR. MACK: Judge, you're right. I'm sorry. I want
16 to get it right, not wrong. I feel that --

17 THE COURT: Stop.

18 LAW CLERK: This is where we're going to add it?

19 (Recess taken, 4:00 p.m. to 4:09 p.m.)

20 THE COURT: Did you get the revision?

21 MR. MACK: Yes, Judge.

22 MR. HEINOLD: Yes.

23 THE COURT: All right.

24 (Pause)

25 MR. MACK: Attorney Heinold has one -- he's got one

1 more issue to talk about.

2 THE COURT: About the charge?

3 MR. MACK: Yes. No, I'm only kidding. I was going
4 to lay it on Mr. Hughes, but --

5 THE COURT: Yes, I know who is responsible. It's
6 not Mr. Hughes. It's not Mr. Heinold.

7 (Jury enters, 4:10 p.m.)

8 THE COURT: Well, we ended up working a full day
9 after all. I'm sorry. I apologize. I thought we had a good
10 plan, but please be seated. Sit back, relax.

11 You don't have to write anything down because I'm
12 going to give you a copy of all these legal rules to have with
13 you when you deliberate.

14 So what I need you to do now is just try to listen
15 because this is the law that's going to control your
16 deliberations and the law you should be thinking about when
17 the lawyers give their closing speeches tomorrow morning.

18 You and I have separate and distinct functions. You
19 as the jury must determine what the facts are in this case.
20 You've listened to all the evidence now and from the evidence
21 you will determine what you consider the facts to be.

22 I must instruct you on the law because that's my job
23 and you should listen carefully while I go through these
24 instructions and you don't have to take any notes.

25 The instructions I give you consist of three parts.

1 The first part involves general rules and principles
2 that define and control your duties as jurors. A lot of that
3 is similar to what we talked about on Monday.

4 The second part deals with the specific rules of law
5 you must apply to the facts you find in this case.

6 And the third part, which I'll give you after the
7 lawyers make their speeches tomorrow, just give you some
8 guidelines on how to conduct your deliberations and how to
9 return a verdict.

10 So in deciding what really happened in this case you
11 must follow your recollection of the evidence, not the
12 recollection of the attorneys or even me.

13 If an attorney states something to be a fact or I
14 state something to be a fact at any time and it's the not the
15 same as your recollection then your recollection of the
16 evidence controls. You must follow your own independent
17 recollection of what the evidence was.

18 You must make your determination of facts based
19 solely on the evidence you've heard and seen and not for any
20 reason outside of this trial. For example, you can't base
21 your verdict on guess, suspicion, speculation, intuition or
22 conjecture.

23 Similarly, you must not allow sympathy or prejudice
24 to influence you. The law demands a just verdict unaffected
25 by anything except the evidence, your common sense and the law

1 as I give it to you. And once you determine what the facts
2 are, that is once you've decided what happened, then you apply
3 it to the law.

4 Now, my role along with giving you the law was to
5 conduct the trial in an orderly, fair and efficient manner and
6 to rule upon questions of evidence during the course of the
7 trial.

8 No one can question the facts as you find them, but
9 you must accept the law as I state it. You may not disregard
10 any instruction and you must not give special attention to any
11 one instruction or question the wisdom of any rule of law.
12 You should consider all these legal principles in their
13 entirety as a whole.

14 Now, we've had a few objections in the trial. You
15 now know what objections are. It's the lawyer's job to do
16 that. That's their duty to represent their client zealously.
17 And the fact that I've denied, granted, sustained or overruled
18 objections should not be taken by you as indicating that I
19 have any view about the case. In ruling I was applying the
20 Rules of Evidence and confining the testimony to only what the
21 rules permit.

22 You must confine your consideration to the evidence
23 presented from the witnesses and any exhibits received into
24 evidence.

25 The fact that I've had discussions with the lawyers

1 at sidebar relating to the Rules of Evidence should have no
2 bearing directly or indirectly on the outcome of the case. Do
3 not concern yourself that we met at sidebar or talked
4 privately or asked you to leave the room because we were
5 discussing legal matters that really didn't relate to your
6 role of determining the facts.

7 And similarly, as we said Monday, nothing I've said
8 or done during the trial should be taken by you as indicating
9 that I have any views either way about what your verdict
10 should be. I'm totally impartial as are you. You have to
11 decide the facts and that's totally your job.

12 Now, if during the course of the trial I sustain an
13 objection by counsel to the question asked by another counsel
14 you are disregard the question. You must not speculate what
15 the answer would have been.

16 If after a question was asked and an answer given I
17 ruled the entry should be stricken from the record, and I
18 think I did that a few times, you are to disregard both the
19 question and the answer. Such matters are not evidence and
20 should not be considered.

21 We had a few instances where the lawyers agreed on
22 facts. If the parties stipulated to facts the law deems those
23 facts to be true. You must, therefore, treat those facts as
24 having been proven for purposes of this case.

25 Now, let me go over again the legal standard that

1 you have to apply.

2 The Yazdani's must prove their claims by a legal
3 standard called a preponderance of the evidence and that means
4 the claim is more likely true than not true.

5 If after considering all the evidence you find the
6 Yazdanis' claims are more likely true than not then you must
7 find for them.

8 And remember you're supposed to think about a
9 balance scale. Put all the evidence to the Yazdani's on one
10 side and to BMW, N.A. on the other side and if the scales tip
11 even slightly to the Yazdani's side then you must find for
12 them.

13 If, however, the scales tip even slightly to BMW's
14 side, or if the two sides of the scale balance evenly, then
15 you must find for BMW.

16 Now, the evidence from which you will find the facts
17 consist of the testimony of the witnesses, documents and other
18 things received into the record as evidence and any facts that
19 were agreed or stipulated to or that I instructed you to find.

20 Let me remind you of things that are not evidence.
21 Statements, arguments, questions of the lawyers are not
22 evidence. If an attorney asked a question of a witness which
23 contains an assertion of fact, and those were leading
24 questions, you may not consider the assertion by the attorney
25 as evidence of that fact. Only the answer is evidence.

1 Similarly, objections are not evidence. If I told
2 you to disregard testimony it's not evidence and anything
3 you've seen or heard outside of court is not evidence and must
4 be -- must be disregarded.

5 Do not let rumor, suspicion or anything outside of
6 this courtroom influence your verdict in any way. You are to
7 decide the case solely on the evidence that was presented in
8 this courtroom.

9 Now, we talked about the two types of evidence,
10 direct and circumstantial.

11 I'll remind you that direct evidence is direct proof
12 of a fact, such as testimony of an eyewitness or any exhibits
13 admitted into evidence. That motorcycle is direct evidence.

14 Circumstantial evidence is evidence consisting of
15 facts and circumstances from which you may infer other
16 connected facts which reasonably follow according to the
17 common experiences of people. And we talked about the rain
18 example that you could infer that it started raining if you
19 saw somebody who was wet or had an umbrella.

20 The law makes no distinction in the weight to be
21 given either direct or circumstantial evidence. You can
22 consider both and you are to decide how much weight to give
23 any particular piece of evidence.

24 Now, any notes you've taken in the trial are aides
25 to your memory. If your memory differs from your notes you

1 should rely on your memory and not your notes. Notes are not
2 evidence.

3 If you've not taken notes you should rely on your
4 own independent recollection of the evidence and should not be
5 unduly influenced by the notes of other jurors. Notes are not
6 entitled to any greater weight than the recollection or
7 impression of each juror about the testimony.

8 Now, one of your important jobs in any trial, and
9 especially this one, is to evaluate the credibility of the
10 witnesses. Credibility is just a fancy legal word for
11 believability.

12 You are the sole judges of witness credibility and
13 only you can determine the importance or the weight that the
14 witness' testimony deserves. I have nothing to do with that.

15 After making your assessment concerning witness
16 credibility you may decide to believe all the witness'
17 testimony, only a part of it or none of it. This is the same
18 process you go through every morning if you make a piece of
19 toast. All right. Sometimes you make a piece of toast and
20 you can butter it and eat it and you're fine. Other times you
21 have to cut part of it off because it's burned and other times
22 you have to throw the whole thing out because it's inedible.
23 So you can apply that same analogy to assessing the testimony
24 of witnesses.

25 In judging the credibility of the witnesses you may

1 consider a number of factors and we talked about those Monday,
2 those common sense factors that you use when you evaluate
3 testimony of witnesses and they're listed on pages seven and
4 eight of the instructions on part one. I won't repeat them
5 since we just did it a couple of days ago.

6 It is for you to say what weight you'll give the
7 testimony from any and all witnesses. You're not required to
8 accept testimony even though the testimony is uncontradicted
9 and the witness is not impeached. You may decide because of
10 the witness' bearing and demeanor or the inherent
11 improbability of his or her testimony or for any other reason
12 that such testimony is not worthy of belief.

13 After making your own judgment or assessment about
14 the believability of a witness you can then attach such
15 importance or weight to that testimony, if any, that you feel
16 it deserves.

17 In making up your minds and reaching a verdict do
18 not -- not make any decision simply because there were more
19 witnesses on one side than the other. Your job is to think
20 about the testimony of each witness you heard and decide how
21 much you believe of what he or she had -- he or she had to say
22 and how much weight to give that testimony.

23 The law does not require any party to call as
24 witnesses all people who may have been present at any time or
25 place involved in the case or who may appear to know something

1 about the facts at issue in this trial.

2 Now, we've heard from a bunch of experts. Michael
3 Zazula, William Vigilante and Kevin Breen. In weighing the
4 testimony of these witnesses you may consider the witness'
5 qualifications, the reasons for the witness' opinions and the
6 reliability of the information supporting those opinions as
7 well as the factors I've previously mentioned for weighing the
8 testimony of witnesses.

9 Opinion testimony should receive whatever weight and
10 credit, if any, you think appropriate given all the evidence
11 in the case.

12 In deciding whether to accept or rely on the opinion
13 of a witness you also may consider any bias that witness may
14 have, including the fact that the witness has been or will be
15 paid for reviewing the case and testifying or from evidence
16 that the witness testifies regularly and makes a large portion
17 of his income from testifying in court.

18 The opinion of a witness has a value only when you
19 accept the facts on which it's based. This is true whether
20 the facts are assumed hypothetically -- and you heard a few
21 hypothetical questions to the experts -- they come from the
22 witness' personal knowledge or they come from some other
23 proper source or they're based on some combination of these.

24 If you find that any important fact assumed in a
25 hypothetical question posed to a witness has not been

1 established by the evidence you are to disregard the witness'
2 opinion given in response to that question.

3 Similarly, if a witness made it clear that his
4 opinion is based on the assumption that an important fact did
5 not exist and you find that it did exist you should disregard
6 the opinion.

7 Now, as I mentioned Monday, a deposition is a sworn
8 testimony of a witness taken before trial during which the
9 witness is placed under oath and swears to tell the truth and
10 the lawyers for each party may ask questions.

11 A court reporter like Dennis records that and you
12 saw some of the deposition testimony displayed to the
13 witnesses and they were questioned about it.

14 This deposition testimony is entitled to the same
15 consideration as if the witness had testified in court and you
16 should use the same factors to evaluate the believability of
17 this testimony as you would evaluate live testimony.

18 In determining the weight to give to the testimony
19 of a witness you should ask yourself whether there was
20 evidence tending to prove that the witness testified falsely
21 about some important fact or whether there was evidence that
22 at some other time the witness said or did something or failed
23 to say or do something that was different from what the
24 testimony was the witness gave at trial.

25 Inconsistencies or discrepancies in the testimony of

1 a witness or between the testimony of different witnesses may
2 or may not cause you to disbelieve or discredit such
3 testimony.

4 You should keep in mind that a simple mistake by a
5 witness does not necessarily mean the witness was not telling
6 the truth as he or she remembers it because as we know people
7 naturally tend to forget some things or remember other things
8 inaccurately. Two or more people witnessing an incident or
9 transaction may simply see or hear it differently.

10 So if a witness has made a misstatement you need to
11 decide whether that misstatement was simply an innocent lapse
12 of memory or an intentional falsehood and the significance of
13 that may depend on whether it has to do with an important fact
14 or an unimportant detail.

15 Generally, the earlier inconsistent or contradictory
16 statements are admitted only to discredit or impeach the
17 credibility of the witness and not to establish the truth of
18 the earlier statements made somewhere other than here during
19 trial.

20 However, if the prior statement was given under
21 oath, such as during a deposition, that earlier statement may
22 be considered for its truth. So if you're confronted with
23 testimony in this trial that differs from sworn testimony in a
24 deposition you can decide which version to believe since
25 they're both under oath.

1 It is for you to determine the credibility, if any,
2 to be given to the testimony of a witness who has made prior
3 inconsistent and contradictory statements.

4 If you decide that a witness has deliberately
5 testified falsely about a material point that is something
6 that could affect the outcome of the trial you may for that
7 reason alone choose to disbelieve the rest of the witness'
8 testimony, but you're not required to.

9 You're free to disbelieve the testimony of that
10 witness in whole or in part or believe it in part and
11 disbelieve it in part taking into consideration all the facts
12 and circumstances of the case.

13 You should consider not only the deliberate
14 falsehood, but all other factors bearing on witness
15 credibility in deciding whether to believe other parts of that
16 witness' testimony.

17 Now, those are the general principles that are going
18 to control your deliberations.

19 Now, I'm going to turn the actual substantive law on
20 the claims that the plaintiff has alleged.

21 The Yazdani's claims against BMW are based on the
22 legal principles of strict liability and negligence and BMW,
23 and specifically BMW, N.A. -- so when I refer to BMW that's
24 what I'm referring to -- denies those claims.

25 Now, the first theory is strict liability. The

1 Yazdani's allege BMW is strictly liable to them for their
2 damages because the motorcycle was defectively designed and
3 did not have adequate warnings.

4 Strict liability for defects in consumer products is
5 primarily based on a policy that a person or entity engaged in
6 the business of selling a product has a duty to sell or market
7 a product that's free from a defective condition, unreasonably
8 dangerous to the consumer or the consumer's property.

9 Now, to prevail on their strict liability claim the
10 Yazdani's must prove the following elements by a preponderance
11 of the evidence. Three things.

12 First, the motorcycle was defective based on a
13 design -- a defective design and/or on inadequate warnings.

14 Second, the defect existed when the motorcycle left
15 BMW, N.A.'s control.

16 And, three, the defect caused the damages the
17 Yazdani's are claiming.

18 I'm going to explain those in a little detail. You
19 may find the motorcycle had a defective design if you
20 determine that a reasonable seller would not have sold the
21 motorcycle as designed knowing the risks involved such as the
22 probability and seriousness of harm.

23 Thus, a reasonable seller would have found that the
24 risks of harm from selling the motorcycle as designed outweigh
25 the benefits to the user and the public as well as the burden

1 or cost of taking precautions.

2 A seller's precautions to advert danger should
3 anticipate and reflect the type and magnitude of risk posed by
4 the sale and use of the product.

5 Now, in balancing the risks and benefits I've
6 mentioned you may consider several factors and I'm going to
7 read them to you. There's six of them and they're listed on
8 page three of Part Two.

9 Number one, the usefulness and desirability of the
10 motorcycle as designed. It's usefulness to the user and the
11 public as a whole.

12 Two, the safety aspects of the motorcycles. That is
13 the likelihood that the motorcycle would cause injury --
14 injury and probable seriousness of the injury.

15 Three, the availability of substitute products which
16 would meet the same need as the motorcycle and not be unsafe.

17 Four, BMW's ability to eliminate the unsafe
18 character of the motorcycle without impairing its usefulness
19 or making it too expensive to maintain its usefulness.

20 Five, the user's ability to avoid danger by the
21 exercise of care in the use of the motorcycle.

22 And, six, the user's anticipated awareness of
23 dangers inherent in the motorcycle because of general public
24 knowledge of the obvious condition of the motorcycle or the
25 existence of suitable warnings or instructions.

1 Now, on the failure to warn the Yazdani's --
2 Yazdani's allege that the motorcycle was defective because it
3 had inadequate warnings about the risk of fire from running
4 the motorcycle at a standstill.

5 A product is defective due to a failure to warn if
6 it was distributed without sufficient warnings to notify an
7 intended user of non-obvious dangers inherent in the product.

8 In deciding whether a warning is adequate you may
9 consider several factors, including its words, position, form,
10 size and color.

11 Alternatively, you may find that a warning is
12 adequate if it renders a product safe for use if it is
13 followed.

14 A product bearing such a warning is neither
15 defective nor unreasonably dangerous.

16 You may find that the motorcycle was defective
17 because it included inadequate warnings if you conclude two
18 things were proven by a preponderance of the evidence.

19 Number one, the warnings about the danger of fire in
20 the rider's manual were inadequate.

21 And, two, this deficiency in warnings made the
22 motorcycle unreasonably dangerous.

23 With regard to the first element if you find that
24 the warnings in the rider's manual were adequate you may not
25 find BMW liable for a failure to warn because -- simply

1 because Mr. Yazdani did not recall reading the warnings.

2 Where a seller provides adequate warnings the seller
3 is entitled to presume under the law that those warnings will
4 be read and heeded.

5 If you find the Yazdani's have established the first
6 element of the strict liability test, that is that the
7 motorcycle was defective because it had a defective design
8 and/or inadequate warnings, you may move to the second element
9 of the strict liability test, that is whether the defect
10 existed when the motorcycle left BMW's control.

11 For this element the Yazdani's must show that the
12 motorcycle was expected to and did reach them without
13 substantial change in condition from the time it was sold. A
14 seller is not liable for damages if it delivers a product in
15 safe condition and subsequent mishandling, alteration or other
16 causes beyond its control render the product defective.

17 The parties do not dispute that the motorcycle was
18 not substantially changed from the time it was sold by BMW.
19 Normal wear and tear is not a substantial change. Therefore,
20 if you find that the motorcycle was defective you must find
21 that the defect existed when it left BMW's control.

22 The final element of the strict liability test is
23 causation. The Yazdani's -- Yazdani's must show that the
24 motorcycle's defective condition was a factual cause of their
25 damages.

1 A defective product is a factual cause of harm when
2 the harm would not have occurred absent the defective
3 condition of the product. The defective condition must have
4 been an actual real factor in causing the harm even if the
5 result is unusual or unexpected.

6 A factual cause cannot be an imaginary or fanciful
7 factor having no connection or only an insignificant
8 connection with the harm.

9 Even if other actions or events, including those by
10 Yazdani's, contributed to or partially caused the Yazdani's
11 harm, if the harm would not have occurred if the product was
12 free from defect then the product factually caused the
13 accident.

14 Thus, for their defective design claim the Yazdani's
15 must show their damages would not have occurred absent the
16 motorcycle's defective design.

17 For their inadequate warnings claim the Yazdani's
18 must show that Mr. Yazdani would not have run his motorcycle
19 at a standstill if he had been properly warned of the risk of
20 fire by BMW.

21 The Yazdani's also claim BMW was negligent in
22 distributing a defectively designed motorcycle.

23 Now, negligence is different from strict liability
24 and I'll explain the difference with negligence.

25 To prevail on a negligence claim the Yazdani's must

1 prove the following elements by a preponderance and there's
2 two things.

3 First, BMW was negligent, which I'm going to explain
4 to you.

5 And, second, the negligence was a factual cause of
6 the damages.

7 Negligence, which is also known as carelessness, is
8 the absence of ordinary care that a reasonably prudent person
9 would use under the circumstances.

10 Negligent conduct may consist either of an act or a
11 failure to act when there is a duty to do so. Negligence is
12 the failure to do something that a reasonably careful person
13 would do or do something -- doing something that a reasonably
14 careful person would not do in light of all the surrounding
15 circumstances established by the evidence in the case.

16 You may find BMW was negligent under the facts and
17 circumstances of this case if you conclude that a reasonably
18 careful seller would not have sold the motorcycle as designed.

19 As with their strict liability claim the Yazdani's
20 must show that BMW's negligent conduct was a factual cause of
21 their damages or their damages would not have occurred absent
22 BMW's negligent conduct.

23 Further, to be a factual cause BMW's conduct did not
24 need to be the only cause of damages. It could concur with
25 other causes.

1 A cause may be a factual cause as long as it
2 contributes to the damages in a way that is not minimal or
3 insignificant.

4 Now, in a negligence case, unlike a strict
5 liability, design defect or failure to warn, Mr. Yazdani's
6 negligence is something you should consider.

7 BMW as a defense alleges Mr. Yazdani's own
8 negligence was a factual cause of his damages. To establish
9 this defense, which applies only to negligence, not strict
10 liability, BMW must show Mr. Yazdani was negligent, meaning he
11 failed to act as a reasonably careful person under the facts
12 and circumstances and his negligence was a factual cause of
13 his own damage -- the damages from the fire. Meaning that Mr.
14 Yazdani's damages would not have occurred absent his own
15 negligent conduct.

16 If you decide that both BMW and Mr. Yazdani were
17 negligent and that the negligence of both parties was a
18 factual cause of the Yazdani's damages you must then decide
19 how much each parties negligence contributed to the damages.

20 I'll give you a verdict slip on the negligence count
21 where you should state each parties share of the negligence in
22 form of a percentage and together these percentages must equal
23 100 percent. So you can break down or portion the negligence
24 if you find both sides were negligent.

25 If you conclude that BMW is liable to the Yazdanis

1 based on principles of strict liability and negligence then
2 you need not decide the issue of damages.

3 The parties have reached an agreement or stipulation
4 on the amount of damages, so all you have to decide is who is
5 liable for strict liability, who is liable for negligence.

6 And then the parties have agreed that once you make
7 that determination they've agreed on what the damages are, so
8 you don't have to decide a dollar amount of the damages.

9 Now, we're going to adjourn for the evening, but
10 first I want to just to talk to the lawyers for one second at
11 sidebar.

12 (Sidebar discussion begins)

13 THE COURT: Anybody have any objections to the
14 charge that I've read, other than the ones you've already
15 preserved?

16 MR. MACK: No, Judge.

17 MR. HEINOLD: At the very end you said you have to
18 decide who is liable. I think it's better if you say if
19 anyone's liable.

20 THE COURT: Okay.

21 MR. HEINOLD: That's the only thing.

22 THE COURT: Okay. I'll fix that. Anything else for
23 the plaintiff?

24 MR. MACK: No, Judge.

25 THE COURT: Okay. Thank you.

1 (Sidebar discussion ends)

2 THE COURT: All right. At the end I referenced that
3 your job is to decide who is liable and if anybody's liable.

4 You might return a verdict that BMW's not liable and
5 if that's the case you don't even need to reach any other
6 issues, but your job is to decide who, if anyone, is liable
7 for the damages that were caused in this case.

8 Now, you still can't discuss the case yet. Almost.
9 We're going to adjourn for the evening. Keep an open mind.
10 We're going to start tomorrow promptly at 9:30 and we're going
11 to start with the opening -- or the closing arguments of the
12 plaintiff. We'll then have closing arguments of the defendant
13 and then the plaintiff will have time to make a brief
14 rebuttal.

15 By that time it should be pretty close to the lunch
16 hour so Ms. Settles will have your lunch ready and waiting for
17 you so you can then begin deliberating and -- over the lunch
18 hour and we'll have the case ready for your consideration
19 then.

20 So thanks for your patience today. I'm sorry we
21 didn't keep to the time frame I thought we'd keep to and I
22 apologize if those of you who may have made plans had to a
23 change your plans. So have a great night and enjoy the
24 beautiful weather. Thank you.

25 (Pause)

1 (Jury exits, 4:37 p.m.)

2 THE COURT: I have all the jury questions. Do you
3 guys want to look at them or do you want to prepare your
4 closing argument unfettered by these questions?

5 MR. MACK: I'd like to look at them. We'd like to
6 look at them.

7 THE COURT: All right. What we'll do is, Steven,
8 could you make a copy for each side --

9 MR. MACK: Thank you, Judge.

10 THE COURT: -- so you have them. You can be seated,
11 everyone.

12 (Pause)

13 THE COURT: Leslie's been keeping track of the
14 exhibits, but I'm hopeful that you guys can confer tonight and
15 get the exhibits set.

16 We're going to give the jury just a pile of both
17 exhibits that have been admitted and they'll be able to take
18 them back with them to the jury room.

19 So if you guys could work on that and make sure that
20 all that's done so we don't have some type of argument
21 tomorrow that's going to delay the deliberations or delay the
22 closings.

23 Anything else we have to do tonight?

24 MR. MACK: Not that I can think of.

25 THE COURT: Okay.

1 MR. HEINOLD: No, Your Honor.

2 THE COURT: All right. Well, I appreciate
3 everyone's patience and thank you for persevering on a tight
4 schedule today and I look forward the -- the closings.

5 I've -- I'm going to tentatively have their lunch
6 delivered about 11:30, so roughly two hours. I'm not going to
7 time you, but that's probably the goal that we should try to
8 stick -- stick to for the closings. Is that agreeable to
9 everyone?

10 MR. MACK: If I were going to go over an hour I
11 think Patrick would pull out a knife and stab me in the neck
12 right here in the courtroom. He's not going to let me.

13 MR. HUGHES: I'm not a violent man, but --

14 MR. HEINOLD: Please go long. Let the record
15 reflect --

16 MR. MACK: I would never say --

17 MR. HEINOLD: -- I said that with a smile and I was
18 joking.

19 MR. MACK: I would never say such things about --
20 about counsel.

21 THE COURT: I saw -- I saw a whole bunch of people
22 lining up behind Patrick, but they can go sit down now.

23 All right. You guys did a great job. Thank you. I
24 appreciate. I'll see you tomorrow morning.

25 MR. MACK: Thank you, Judge.

1 THE COURT: All right.

2 MR. HEINOLD: Thank you, Your Honor.

3 (Proceedings concluded at 4:40 p.m.)

4 * * *

5 (Remainder of hearing was requested not to be transcribed)

6
7 C E R T I F I C A T I O N

8
9 I, Joan Pace, court approved transcriber, certify
10 that the foregoing is a correct transcript from the official
11 electronic sound recording of the proceedings in the above-
12 entitled matter.

13
14 _____ November 10, 2016

15 JOAN PACE

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